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Before the
Federal Communications Commission
Washington, D.C. 20554

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| In re Applications of |) | MM Docket No. 93-241 |
| |) | |
| DARRELL BRYAN |) | File No. BPH-920109MA |
| |) | |
| SBH PROPERTIES, INC. |) | File No. BPH-920123MD |
| |) | |
| |) | |

For Construction Permit for
New FM Channel 276A
Tusculum, Tennessee

To: Honorable John M. Frysiak
Administrative Law Judge

OPPOSITION TO WITNESS NOTIFICATION

SBH Properties, Inc. ("SBH") by counsel herewith submits its opposition to the witness notification, submitted in the above proceeding by Darrell Bryan. In support whereof the following is shown:

1. By letter of his counsel, dated February 14, 1994, Darrell Bryan ("Bryan") gave notice of his intention to call William H. Seaver and Paul Hite for cross-examination at the hearing scheduled to commence on March 1, 1994. SBH opposes Bryan's notice, contending that he has failed to make the showing required by the Commission's Rules to demonstrate a need for cross-examination, and requests the Presiding Judge to direct that SBH not be required to produce either Mr. Seaver or Mr. Hite for cross-examination.

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2. Section 1.248 of the Commission's Rules was amended in December, 1990, as a part of the Commission's efforts to provide for the expedition of the comparative hearing process. Proposals to Reform the Comparative Hearing Process, 6 FCC Rcd. 157 (1991) As the Commission indicated at the time, Section 1.248 was amended to "make it clear that ALJ's should permit oral testimony and cross examination only where material issues of decisional fact cannot be adequately be resolved without oral evidentiary hearing procedures." Id. at 162. As amended, Section 1.248 provides that "cross examination will be permitted only where, in the discretion of the presiding judge, material issues of decisional fact cannot be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings."

3. In his witness notification, Bryan made no showing of need, whatsoever, for any cross-examination of William H. Seaver. Instead, Bryan simply made the general statement that "the witnesses will be examined on matters relevant under the standard comparative." However, such a general statement of relevance is insufficient to meet the explicit test of Section 1.248. Thus, although Bryan deposed Mr. Seaver in this proceeding, he has made no effort, whatsoever, to advance any showing that any "material issues of decisional fact cannot be resolved without" requiring Mr. Seaver to appear for cross-examination, or that his further testimony is required by "public interest." Bryan has not identified a single fact that Seaver's testimony is intended to

establish. Accordingly, given the complete absence of any proffer of any showing by Bryan that Mr. Seaver's testimony is necessary to resolve any material issue of decisional fact or that the public interest otherwise requires his testimony, it would be inconsistent with the explicit requirements of Section 1.248, as well as with the Commission's intent as expressed in Proposals to Reform the Comparative Hearing Process, 6 FCC Rcd. 157, 162 (1991), to require Mr. Seaver to appear.

4. Bryan also seeks to cross-examine Paul Hite, a non-voting shareholder in SBH. With respect to Mr. Hite, Bryan has made some effort to demonstrate a need for his testimony. In that regard Bryan, relying upon certain deposition testimony given by Mr. Hite, contends that Mr. Hite testified that "he presumed that he had veto power over costs and could veto any expenditure." On this basis Bryan contends that cross-examination of Mr. Hite is necessary "to determine the extent of the integration credit the applicant deserves." However, regardless of whether Mr. Hite's deposition testimony does or does not have any impact on the extent to which SBH would be entitled to integration credit, such inquiry is no longer relevant, inasmuch as the integration of ownership criterion has been eliminated. The Court of Appeals in Susan M. Bechtel v. FCC, Case No. 92-1978, decided December 17, 1993, explicitly precluded the Commission from continuing to utilize the integration of ownership into management criterion. The Commission failed to seek rehearing in that case. Accordingly,

despite having at least attempted to advance a showing of need for his testimony, inasmuch as Bryan acknowledges that the matters about which it seeks to examine Paul Hite are relevant only to the now defunct integration criterion, Bryan has not shown that any "material issues of decisional fact cannot be resolved without" his testimony, inasmuch as any unresolved issues of fact relating to the integration criterion are no longer relevant and, thus, of no decisional significance.

5. However, should the Presiding Judge disagree that the integration criterion is no longer relevant, SBH contends that Mr. Hite should not be required to travel to Washington and testify further in this proceeding, but, instead, that Bryan should be permitted to introduce the identified portions of Mr. Hite's deposition testimony (i.e., Transcript pp. 16-17) into evidence in lieu of cross-examination. 1/

6. Having failed to demonstrate that the testimony of either Mr. Seaver or Mr. Hite is necessary to the resolution of any "material issues of decisional fact" or the public interest otherwise requires their testimony, Bryan's request that they be required to appear for cross-examination should be denied.

1. The Commission could yet elect to petition the Supreme Court for a writ of certiorari, which would have to be filed on or before March 17, 1994. Accordingly, should the Presiding Judge be unwilling at this time to rule (a) that Paul Hite need not appear for cross-examination or (b) that the identified portions of his deposition testimony be admitted into the record in lieu of requiring him to appear for cross-examination, then the Presiding Judge should postpone the hearing in this proceeding until after March 17, 1994, in order that Mr. Hite would not be required to travel to Washington to testify regarding a matter which is of no relevance.

However, as indicated above, should the Presiding Judge disagree with SBH's contention that the integration criterion is no longer a relevant consideration in this proceeding in light of Susan A. Bechtel, instead of requiring Paul Hite to travel to Washington to testify further, those portions of his deposition testimony, which have been identified by Bryan (at Transcript pp. 16-17), should be entered in the record in lieu of his live testimony or, alternatively, the hearing should be postponed until such time as the relevance of the proposed testimony can be determined.

WHEREFORE, premises considered and good cause having been shown, the Presiding Judge should direct that William H. Seaver and Paul Hite not be required to appear for cross-examination.

Respectfully Submitted

SBH PROPERTIES, INC.

By: 

Timothy K. Brady
Its Attorney

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February 22, 1993

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 25 day
of February, 1994, served a copy of the foregoing Opposition to
Witness Notification by First Class mail, postage prepaid (except
as noted) upon the following:

Honorable John M. Frysiak **
Administrative Law Judge
Federal Communications Commission
2000 L Street, NW, Room 223
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** Via Federal Express


TIMOTHY K. BRADY